78-1129

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-.....

FRANK J. BRASCO,

Petitioner,

—v.—

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JOHN G. BONOMI
630 Fifth Avenue
New York, N. Y. 10020
(212) 397-9751
Attorney for petitioner

SAUL FRIEDBERG
402 South Country Road
Brookhaven, N. Y. 11719
Of counsel

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THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

There was no opinion below.

The New York Court of Appeals, by its order entered October 19, 1978, denied petitioner's motion for leave to appeal to that court from an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered April 3, 1978. No opinion accompanied that order of the New York Court of Appeals. The order of the New York Court of Appeals is reported at 45 NY2d 711, and is reproduced in the Appendix.

The order of the Appellate Division, Second Department, referred to, was also not accompanied by an opinion.

It was accompanied by a decision slip. The order and decision slip are reported at 62 AD2d 1006, and are reproduced in the Appendix.

On June 9, 1978, the Appellate Division, Second Department, made an order denying petitioner's motion in that court for leave to appeal to the New York Court of Appeals. That order was accompanied by a decision slip but not by an opinion. The order of June 9, 1978 and its accompanying decision slip are not reported. They are reproduced in the Appendix.

Jurisdiction

The order of the Court of Appeals of the State of New York, review of which is here sought, was entered October 19, 1978. The jurisdiction of this Court rests on 28 U.S.C. 2101.

Questions Presented

1. Is subsection 4 of Section 90 of the Judiciary Law of New York, which legislatively mandates the automatic disbarment of a New York attorney-at-law upon his conviction of a felony, without the possibility of any judicial consideration or action, and by reason of which petitioner was disbarred by the State of New York, a bill of attainder violative of Art. I, Section 10 of the Constitution of the United States?

2. Did the retroactive, automatic disbarment of petitioner, a New York attorney-at-law, without the possibility of judicial consideration or action, by the action of subsection 4 of Section 90 of the Judiciary Law of New York, as retroactively interpreted and applied by the New York

Court of Appeals decision in *Matter of Chu*, 42 NY2d 490 (1977), violate the prohibition against *ex post facto* laws contained in Art. I, Section 10 of the Constitution of the United States and deprive petitioner of valuable rights in violation of the Fourteenth Amendment of the Constitution of the United States?

3. Did the action of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, in performing the ministerial act of striking petitioner's name from the roll of attorneys pursuant to subsection 4 of Section 90 of the Judiciary Law of the State of New York violate petitioner's rights under Art. I, Section 10 and the Fourteenth Amendment of the Constitution of the United States?

Statute Involved

The statute which this case involves is subsection 4 of Section 90 of the Judiciary Law of New York, which may be found at 29, Sections 1-499, McKinney's *Consolidated Laws of New York* 120, and which reads as follows:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> "Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Statement of the Case

Petitioner Frank J. Brasco was admitted to the Bar in the State of New York at a term of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department on March 26, 1958.

On October 23, 1973, petitioner was indicted in the United States District Court for the Eastern District of New York. The single count indictment, 73 Cr. 985, charged him with having engaged in a conspiracy, in the period from June 1967 to November 1968, while he was a Representative from Brooklyn in the Congress of the United States, to influence the United States Post Office Department to award contracts for the hauling of mail, in violation of Section 371 of Title 18, United States Code.

18 USC 371 reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The offense in petitioner's case was a federal felony.

Petitioner pleaded not guilty and went to trial before a jury in the Eastern District. On July 19, 1974, the jury

returned a verdict of guilty, and, on October 21, 1974, a judgment of conviction was entered and petitioner was sentenced to a jail term of three months, to probation for an additional 57 months, and to a fine of $10,000. The judgment of conviction was affirmed May 21, 1975. *United States* v. *Brasco,* 516 F2d 816 (2d Cir. 1975), *certiorari den.,* 423 U.S. 860 (1975).

As a result of his conviction, petitioner became subject to professional discipline as a New York attorney.

At the time the judgment of conviction was entered, October 21, 1974, and now, there were and are two New York statutes governing attorney-discipline, to wit: subsections 2 and 4 of Section 90 of the Judiciary Law of New York (hereinafter referred to as Judiciary Law 90.2 and Judiciary Law 90.4).

Judiciary Law 90.2 reads in relevant part as follows:

> "2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . ." 29, Sections 1-499, McKinney's *Consolidated Laws of New York* 119.

Discipline under Judiciary Law 90.2 is subject to the provisions of subsection 6 of Section 90 of the Judiciary Law (Judiciary Law 90.6), which reads in relevant part as follows:

"6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state, or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense." McKinney, *op. cit.* 120.

The procedure for disciplining an attorney under Judiciary Law 90.2, which is also governed by Part 691 of the Rules of the Appellate Division, Second Department, may be described as follows.

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts (hereinafter called the Grievance Committee) would institute a proceeding in the Appellate Division, Second Department, by serving and filing a petition charging specified acts of professional misconduct by the attorney involved and asking the court to impose such discipline as to it appeared proper. The attorney involved would have the opportunity to file a reply. The court would then make an order appointing a referee to take testimony as to the charges and to report the same with his opinion to the court.

Hearings would then be held before the referee at which both sides would have the opportunity to present evidence and cross-examine each other's witnesses, after which the referee would make his report to the court. The court would then make an order (presumably) confirming the

report of the referee and imposing discipline. The discipline could be either censure, suspension from practice for such period as the court determined and specified in its order, or disbarment. Of course, the referee might find the charges not sustained and the court might then dismiss them.

An attorney suspended by such an order had the right to apply for reinstatement after the expiration of the period of suspension; if he were ordered disbarred, he had the right to apply for reinstatement after seven years. His reinstatement would rest in the unrestricted discretion of the court.

Judiciary Law 90.4, the other statute governing attorney discipline, referred to above, is set out as the Statute Involved above. It has long been the law in New York that disbarment under Judiciary Law 90.4 is an automatic result of the statute and requires no court consideration or action. As the New York Court of Appeals said in *Matter of Barash*, 20 NY 2d 154, 157 (1967), disbarment under Judiciary Law 90.4 is automatic and "no further action, judicial or otherwise, is required to constitute the fact . . ."

As a result, an attorney subject to Judiciary Law 90.4 never receives any "notice" of his disbarment, and he is disbarred as of the date of his conviction without having had the opportunity to present evidence on his own behalf, whether as to the nature of his wrongful conduct, going to mitigation, bearing on his past record or on his present character and fitness to practice law, or bearing on the extent of the penalty to be imposed. In fact, no court, nor any other body, gives any consideration to the extent of the penalty to be imposed; disbarment is the automatic result of the statute.

Such being the case, the action of the court under Judiciary Law 90.4 in striking the attorney's name from the rolls is purely a mandatory, ministerial act. As the Appellate Division, First Department said recently in *Matter of Sugarman*, 64 AD2d 166 (1st Dept. 1978):

> "The termination of membership in the Bar by reason of the attorney's conviction of a felony differs from disbarment by order of this court [under Judiciary Law 90.2] in that the court does not disbar an attorney convicted of a felony. The statute renders him ineligible to continue as a member of the Bar; this court merely records the fact that the convicted attorney is no longer a member of the Bar."

Until a statutory amendment which was signed into law December 7, 1978, the consequence is that an attorney disbarred by operation of Judiciary Law 90.4 is disbarred for life; no New York court has the power to, and no New York court can or will, reinstate his license and right to practice law, no matter how much time has passed, no matter how he has conducted himself, and no matter what his character and fitness may be. *Matter of Sugarman, supra.* As the New York Court of Appeals said in *Matter of Donegan*, 282 NY 285, 292 (1940), the effect of Judiciary Law 90.4 is "automatic and irrevocable disbarment for life . . . a consequence most severe [which] partakes of the nature of punishment."

The statute signed into law December 7, 1978 amended subsection 5 of Section 90 of the Judiciary Law of New York so that that subsection now reads:

> "Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this or another state of the United States, *or if during a period of seven years after such removal or debarment, the attorney and counsellor-at-law has not been convicted of a crime,* the appellate division shall have power to vacate or modify such order of debarment." (Matter in italics added by amendment.)

It is uncertain at this time whether the amendment applies to attorneys who were disbarred by the automatic operation of Judiciary Law 90.4, and it is equally uncertain, if it does, whether it applies to those so disbarred prior to the effective date of the amendment (as was petitioner). It must also be noted that, while the discretion of the court to reinstate an attorney disbarred under Judiciary Law 90.2 is unrestricted, the amendment permits such discretion to be exercised as to attorneys disbarred by Judiciary Law 90.4 only if they have not been convicted of any crime during the seven year period after disbarment.

At the time of petitioner's conviction October 21, 1974, the operation of Judiciary Law 90.4 was controlled by the holding of the New York Court of Appeals in the 1940 case of *Matter of Donegan, supra. Donegan* established that, if an attorney was convicted in federal court of a federal felony, he was not subject to the operation of Judiciary Law 90.4 unless the federal felony of which he was convicted found its counterpart among the statutory felonies set out in the Penal Law of New York.

The crime of which petitioner was convicted, a conspiracy in violation of 18 USC 371, is classified by federal law as a felony. However, criminal conspiracies, with exceptions not here relevant, are classified as New York misdemeanors by Art. 54 of the 1909 Penal Law of New York and by Art. 105 of its present Penal Law.

Therefore, under the rule in *Donegan,* petitioner was not subject to the operation of Judiciary Law 90.4 and was not disbarred by and at the time of his conviction.

However, petitioner had been found guilty of a crime and, therefore, although not subject to Judiciary Law 90.4, he was subject to Judiciary Law 90.2.

Under Judiciary Law 90.2, as stated above, petitioner would have received notice of the charges and a hearing at which he could have presented evidence in his own behalf. The rule of Judiciary Law 90.2 cases based upon conviction of a crime not a felony, as to what evidence may be introduced and considered, is set forth as follows in *Matter of Levy,* 37 NY2d 279, 281-2 (1975):

> "While the issue of guilt may not be relitigated, the attorney may, of course, introduce any competent evidence by means of which to explain or mitigate the significance of his criminal conviction . . . any proof which is reasonably relevant to the ultimate issues—the character of the offense committed and the nature of the penalty, if any, to be imposed . . . Thus, there should be received any competent proof which will assist the Appellate Division in the discharge of its difficult and delicate responsibility of determining what sanction, if any be appropriate, will best serve the public interest and at the same time assure the particular attorney full due process and fairness in recognition of the substantial interest that is his in his right to practice law."

That being the New York law, Judiciary Law 90.2 proceedings can and have resulted in wide variations in the penalties imposed in cases involving the same type of misconduct, including cases where the misconduct consisted of convictions for federal felonies which are misdemeanors under New York law.

As examples, in cases where attorneys have been charged with the conversion of client-funds, there have been wide differences in the penalties imposed, as shown by the following table:

Censure—Matter of Schner, 278 App. Div. 138 (1st Dept. 1951); *Burke* v. *New York State Bar Ass'n,* 55 AD 2d 988 (3rd Dept. 1977)

Six month suspension—Matter of Ginsberg, 253 App. Div. 197 (1st Dept. 1938)

One year suspension—Matter of Zipkin, 249 App. Div. 100 (1st Dept. 1936)

Two year suspension—Matter of Mahan, 237 App. Div. 664 (1st Dept. 1933)

Three year suspension—Matter of Smiley, 51 AD2d 223 (1st Dept. 1976)

Disbarment—Matter of Cave, 64 AD2d 199 (2d Dept. 1978).

Turning to cases involving, as does petitioner's case, convictions for federal felonies based on conduct not felonious under New York law, there were the same wide variations in the penalties imposed, as the following examples show:

Censure—Matter of Weiss, 54 AD2d 78 (1st Dept. 1976)

Three month suspension—Application of Bar Assn. of Nassau County, 4 AD2d 673 (2d Dept. 1957)

Six month suspension—Matter of Spitzer, 34 AD2d 323 (1st Dept. 1972)

One year suspension—Curtis v. *Monroe County Bar Ass'n*, 39 AD2d 86 (4th Dept. 1972); *Matter of Mahan, supra; Matter of Nunan*, 12 AD2d 365 (1st Dept. 1962); *Matter of Crosby*, 281 App. Div. 801 (4th Dept. 1953)

Two year suspension—Matter of Selman, 51 AD2d 77 (1st Dept. 1976)

Disbarment—Matter of Glass, 59 AD2d 248 (1st Dept. 1977); *Matter of Quinn*, 45 AD2d 466 (1st Dept. 1974); *Matter of Levy*, 44 AD2d 94 (1st Dept. 1974), affirmed, 37 NY2d 279 (*supra*); *Matter of Coin*, 31 AD2d 32 (1st Dept. 1968).

In *Matter of Hemlock*, 52 AD2d 248 (1st Dept. 1976), there were two attorney-respondents, Hemlock and Hoffer, each of whom had been convicted in federal court for complicity in the same conspiracy, the crime being a felony under federal law but a misdemeanor under New York law. Hemlock was disbarred; Hoffer was suspended for three years. The reason for the difference in the penalties was the difference in the evidence in explanation and mitigation presented by the two respondents.

An example of the kind of reasoning employed by the New York courts in reaching these different results is this language from *Matter of Taylor*, 26 AD2d 88, 89-90 (1st Dept. 1966), where the respondents had been convicted of violating 26 USC 7203:

"We find that the circumstances to a large degree extenuate his conduct. Particularly impressive are his hitherto respectable career, the degree of punishment

to which he has been subjected, the co-operation he has given, and the candor he has displayed in this proceeding."

Therefore, had a Judiciary Law 90.2 proceeding been instituted against petitioner at bar at the time of his conviction and in accordance with the rule in *Donegan*, he would have had the right and the opportunity to offer a wide variety of evidence in explanation and mitigation and the court would have tailored the penalty to the evidence; petitioner might have been censured, or suspended for such period as the court directed, or disbarred. If disbarred, petitioner would have the right to apply for reinstatement after seven years. It would even have been possible for the charges to have been dismissed and no penalty at all imposed. See: *Matter of Anonymous No. 1*, 45 AD 2d 88 (1st Dept. 1973), appeal dismissed, 34 NY 2d 517 (1974); *Matter of Anonymous No. 2*, 45 AD 2d 89 (1st Dept. 1974), motion for leave to appeal denied, 34 NY 2d 517, appeal dismissed, 34 NY 2d 961 (1974).

On October 13, 1977, the New York Court of Appeals decided the case of *Matter of Chu*, 42 NY2d 490 (1977) and, by *Chu*, repealed and nullified its decision in *Matter of Donegan, supra*. In *Chu*, the court ruled that the felonies covered by Judiciary Law 90.4 did, in fact, include every federal felony, whether it was comparable to a New York Penal Law felony or not.

There were two days in which *Chu* could have been given effect: one, New York could have made it applicable only to felonies committed after *Chu* was decided, or to convictions after that date; or, two, New York could have made it applicable to all convictions for federal felonies, including those convictions which occurred prior to the date *Chu*

was decided, during the period when *Donegan* was in effect. If the second alternative was chosen, then the nature of the penalty for federal felony convictions ante-dating *Chu* would be retroactively changed by *Chu;* and, also, the procedure would be retroactively changed from one requiring notice and a hearing to one of the automatic imposition of the penalty. As will be seen, New York chose the second alternative and applied it to petitioner.*

Any doubts as to the scope of *Chu,* generated by the somewhat ambiguous language of the opinion in it, were removed by the New York Court of Appeals in its decision in *Matter of Thies,* 45 NY2d 865 (1978). In *Thies,* however, three of the seven judges filed a vigorous dissenting memorandum containing the following (45 NY 2d at 867):

> "This inflexibly harsh rule needlessly rejects the principle that firm discipline can be achieved without sacrificing fairness and reason (see concurring opinion, *Matter of Chu,* 42 NY2d 490, 495). The aberrational [sic] results which today's determination will bring may now be avoided only by legislative action."

Commenting on these dissenting views, the majority in *Thies* said (45 NY2d at 866):

> "If as [the dissenters] urge, consideration should be given to the gravity of the offense and to mitigating circumstances, on principle this would seem to be equally true with respect to convictions for New York felonies. Yet, as the dissenters recognize, the validity

* The New York courts have not yet decided whether *Chu* applies to attorneys as to when disciplinary proceedings were terminated prior to *Chu.*

> of the concept of automatic disbarment as applied to New York felonies has long been upheld." *

Between October 21, 1974, when petitioner was convicted, and October 13, 1977, when *Chu* was decided, neither the Grievance Committee, nor the court, nor anyone else, instituted a disciplinary proceeding against petitioner under Judiciary Law 90.2. During those years, petitioner continued, properly, to practice law in Brooklyn unimpeded by, and without complaint from, anyone.

However, after *Chu,* the State of New York immediately took the position that, by reason of that case, petitioner was retroactively disbarred as of the date of his conviction under Judiciary Law 90.4.

By a Notice of Motion dated December 27, 1977, the Grievance Committee presented petitioner's 1974 conviction of a federal felony to the attention of the Appellate Division, Second Department, and asked that court to perform the ministerial, mandatory act, under Judiciary Law 90.4, of striking petitioner's name from the roll of New York attorneys. In support of its request, the Grievance Committee cited *Chu,* and said, in the affidavit it submitted in support of its motion: "Respondent [here petitioner], having been convicted of a felony, was automatically disbarred (*Matter of Chu* . . .)."

In opposition to the Grievance Committee motion, petitioner submitted to the Appellate Division, Second Department, an affidavit in which it was stated:

> "If Section 90(4) of the Judiciary Law of New York State is intended, interpreted and applied to mandate

* Neither the United States Supreme Court, nor any lower 90.4. In fact, the New York Court of Appeals has never given direct consideration to the question.

> the summary disbarment of Respondent [here petitioner] for life, without a hearing of any nature concerning mitigating circumstances and solely on the basis of his federal felony conviction, then Section 90(4) . . . is repugnant to the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States . . . "

This constitutional position was supported at length in the Memorandum of Law submitted by petitioner to the Appellate Division, Second Department, in opposition to the Grievance Committee motion.

On April 3, 1978, the Appellate Division, Second Department, made its order, based upon its decision slip, which granted the motion, struck petitioner's name from the roll of attorneys, and enjoined petitioner from the practice of law, citing *Matter of Chu*. That order, together with its accompanying decision slip, is reproduced in the Appendix. The court did not issue any opinion in connection with its order.

As is evident from the order and decision slip, and by the absence of any opinion, the court gave no consideration to petitioner's claim that the retroactive, automatic disbarment of him by reason of Judiciary Law 90.4 and *Matter of Chu*, and the striking of his name from the roll of attorneys by reason thereof, violated his rights under the Constitution of the United States.

By reason, therefore, of the decision in *Matter of Chu*, the penalty of automatic (perhaps life-time) disbarment was retroactively imposed upon petitioner in consequence of his 1974 conviction; and he was retroactively deprived of the opportunity to present evidence, which he theretofore

would have had, in explanation and mitigation, and he was retroactively deprived of the right, which he theretofore had, to have a New York court give consideration to the question of what penalty should be imposed in the light of the entire record.

By Notice of Motion of May 10, 1978, petitioner moved the Appellate Division, Second Department, under Section 5602 of the Civil Practice Law and Rules of New York, for permission to appeal the court's action to the state's highest court, the New York Court of Appeals, the reasons cited in support of the motion being the same claims under the United States Constitution described above. Petitioner's motion was denied by the court's order of June 9, 1978, which also was supported by a decision slip and was not accompanied by an opinion. The order and decision slip are reproduced in the Appendix. Once again the court apparently ignored the constitutional issues completely.

By a Notice of Motion of July 18, 1978, also made pursuant to CPLR 5602, petitioner then moved in the New York Court of Appeals for leave to appeal the Appellate Division, Second Department action to that court. Petitioner's above-described constitutional claims were urged on the court as reasons for granting permission to appeal.

By its order of October 19, 1978, the New York Court of Appeals denied petitioner's motion for leave to appeal, its order, which is reproduced in the Appendix, not being accompanied by an opinion. Again the court apparently ignored petitioner's constitutional claims. This order of the New York Court of Appeals terminated the proceeding in the New York courts and is the final action of which petitioner seeks review here.

REASONS FOR GRANTING THE WRIT

Section 90.4 of the Judiciary Law of New York, on Its Face and as Applied to Petitioner, Grossly Violates Art. I, Section 10 and the Fourteenth Amendment of the Constitution of the United States in a Manner Which, Since It Involves the Relationship Between Courts and Their Officers, Attorneys-at-Law, Strikes at the Administration of Justice. The State Courts Decided These Substantial Federal Questions in a Way Not in Accord With Applicable Decisions of This Court.

1. Judiciary Law 90.4 is a bill of attainder which violates Art. I, Section 10 of the United States Constitution.

In *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 18 L. Ed. 356, 363 (1867), this Court defined a bill of attainder as "a legislative act which inflicts punishment without judicial trial." Eighty years later, the Court described bills of attainder as follows:

> "[L]egislative acts . . . that apply either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946).

Judiciary Law 90.4 meets every requirement of the definition since it is a legislative act which inflicts a grievous punishment without a trial and without any judicial consideration or action.

There can be no doubt that the automatic disbarment imposed by Judiciary Law 90.4 is a punishment.

> "Any deprivation or suspension [of the right to practice a profession] is punishment, and can in no otherwise be defined." *Cummings* v. *Missouri*, *supra*, 18 L. Ed. at 362.
>
> "[E]xclusion from any of the professions . . . can be regarded in no other light than as punishment . . ." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 18 L. Ed. 366, 370 (1867).

In *Spevack* v. *Klein*, 385 U.S. 511, 514 (1966), the Court spoke of "the dishonor of disbarment and the deprivation of a livelihood" resulting from it.

In *Erdmann* v. *Stevens*, 458 F2d 1205, 1210 (2d Cir. 1972), the court said:

> "[F]or most attorneys the license to practice law represents their livelihood, the loss of which may be a greater punishment than a monetary fine. See *Bradley* v. *Fisher*, 80 U.S. [13 Wall.] 335, 355, 20 L. Ed. 646 (1872) . . ."

The New York Court of Appeals has expressed the same view. "[D]isbarment . . . [is] a consequence most severe [which] partakes of the nature of punishment." *Matter of Donegan*, *supra*, 282 NY at 292. Disbarment is a "penalty" for professional misconduct and deprives the attorney "of the substantial interest that is his in his right to practice law." *Matter of Levy*, *supra*.

Similarly, "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." *United States* v. *Lovett*, *supra*, 328 U.S. at 316. And deprivation of the right to hold union office is a punishment. *United States* v. *Brown*, 381 U.S.

437 (1965). In both *Lovett* and *Brown*, the classification of the consequence as punishment was made in connection with holdings that the legislation in question was a bill of attainder.

The Court has expressed its view that a basic purpose, in our political structure, for the proscription against bills of attainder, is the necessity of guaranteeing the constitutional separation of powers, it being the function of the courts, not the legislature, to prescribe punishments for offenses. The proscription is "a general safeguard against legislative excercise of the judicial function, or more simply—trial by legislature." *United States* v. *Brown, supra,* 381 U.S. at 442. Nowhere is this consideration of more consequence than the area of attorney discipline. Attorneys, being court officers, and not creatures of the legislature, may be subjected to discipline only by the court, after judicial inquiry and judgment, and not by legislative fiat. Any other rule would strike at the heart of the separation of powers and the independent judiciary. As stated by this Court in *Cummings* v. *Missouri, supra,* 18 L. Ed. at 370:

> "The profession of an attorney and counselor is not like an office created by an act of Congress . . . They are officers of the court: admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it

> for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded . . . Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases."

The Court repeated these views in *Ex parte Garland, supra,* saying there that an attorney does not hold his office by "grace or favor" and can be disbarred only "by the judgment of the court, for moral or professional delinquency." 71 U.S. at 379.

Once again, this time after 105 years, another federal court used almost the same language. "The court alone admits an applicant to practice before it. Thereupon he becomes an officer of the court. The power to discipline . . . rests exclusively with the court." *Erdmann* v. *Stevens, supra,* 458 F2d at 1209.

The American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, in its *Problems and Recommendations in Disciplinary Enforcement (Final Draft, June 1970),* pp. 13 *et seq.,* expressed the same view, speaking of the court's "exclusive jurisdiction" to supervise the Bar "without or *despite* contrary legislative action." (Emphasis added.)

This being so, the fiat of the New York legislature in prescribing automatic disbarment upon conviction of a felony is a patent bill of attainder, in violation of the United States Constitution. It is a violation which strikes at the separation of powers and undermines the independence and integrity of the courts, of the court-attorney relationship, and of the administration of justice, of which this Court should take cognizance.

It is also a gross injustice to the attorney involved here, because it has deprived him of the right, which is his as an officer of the court, to have the court consider his professional history and his character and fitness, as well as the nature of his offense, and impose a penalty properly fitted to the case. The discussion, in the Statement of the Case, above, of the variety of the penalties imposed by the New York courts for the same offense after they have reviewed all the circumstances, underlines the injustice to petitioner here.

2. The disbarment of petitioner by Judiciary Law 90.4 deprived him of his constitutionally protected interest in his right to practice law without due process of law in violation of the Fourteenth Amendment as interpreted by authoritative decisions of the United States Supreme Court.

a. *The* ex post facto *effect of* Matter of Chu *violated petitioner's due process rights.*

When petitioner, in 1967-1968, committed the acts for which he was convicted, and when he was convicted for those acts in 1974, *Matter of Chu, supra,* had not been decided, and *Matter of Donegan, supra,* was still the law.

Under *Donegan,* Judiciary Law 90.4 did not apply to petitioner. If he was to be disciplined, the proceedings had to take place under Judiciary Law 90.2.

Under Judiciary Law 90.2, petitioner was entitled to a judicial hearing at which he would have had the opportunity to present evidence in mitigation and explanation and, at the end of which, the court would have discharged "its difficult and delicate responsibility of determining what sanction, if any be appropriate, will best serve the public interest and at the same time assure [petitioner] full due process and fairness in recognition of the substantial interest that is his in his right to practice law." *Matter of Levy, supra.*

As has been amply demonstrated in the Statement of the Case above, at the end of the judicial inquiry the court might have found that no penalty should be imposed, or it might have decided on a penalty which could have been censure, suspension for a specified period, or disbarment. If disbarrred, petitioner could have applied for reinstatement after seven years, and when he did so the court would have the unrestricted discretion to reinstate him.

As it happened, in the three years from his conviction in 1974 until 1977 when *Chu* was decided, petitioner was permitted by the State of New York to continue his practice of law unimpeded and no proceedings whatsoever were brought against him.

Petitioner's situation was changed completely, to his great disadvantage, by *Matter of Chu.*

Matter of Chu, decided October 13, 1977, determined that Judiciary Law 90.4 did indeed apply to petitioner and that, retroactively, he had therefore been automatically disbarred for life, with no possibility of reinstatement, as of the date of his conviction, October 21, 1974. (The amendment of Judiciary Law 90.5 had not been enacted at the time *Chu* was decided.) In the words of the statute, "upon [his] conviction [petitioner] cease[d] to be an attorney and counselor-at-law, or to be competent to practice as such."

Chu did more. It took away from petitioner the right which he had theretofore had to a judicial hearing, to present evidence in mitigation and explanation, and to have the court determine the penalty to be imposed by reason of his conviction in the light of all the evidence. It took away from him the possibility, which he had had, of "acquittal," or of being censured, or of being suspended

for a specified period. And it took away from him the right, were he disbarred, to apply for reinstatement after seven years. As a result of *Chu*, petitioner was automatically disbarred for life, without possibility of reinstatement, by legislative fiat.*

Chu, therefore, greatly worsened petitioner's situation and changed the consequences of his criminal conviction radically for the worse; petitioner was thus subjected to a classic *ex post facto* result.

The judicial definition of the *ex post facto* effect has been unchanged since the founding of the Republic and it clearly covers what happened to petitioner.

In *Fletcher* v. *Peck*, 10 U.S. (6 Cranch.) 87, 3 L. Ed. 162, 178 (1810), this Court said that an *ex post facto* law is one "which renders an act punishable in a manner in which it was not punishable when it was committed."

This was repeated in *Cummings* v. *Missouri*, *supra*, 18 L. Ed. at 364, where the Court described an *ex post facto* law as one which imposed an "'additional punishment to that prescribed when the act was committed.'" To the same effect, see: *Ex parte Garland*, *supra*, 18 L. Ed. at 370; *Burgess* v. *Salmon*, 97 U.S. 381 (1878); *Thompson* v. *Utah*, 170 U.S. 343, 351 (1898), where the Court said that an *ex post facto* law is "one which 'alters the situation of the accused to his disadvantage.'"; and *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-54 (1964), where the Court had the following to say:

* As stated above, it is uncertain whether the December 7, 1978 amendment of Judiciary Law 90.5 applies to petitioner. Further, as also stated above, the court's discretion under that amendment is restricted.

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, §10, of the Constitution forbids . . ."

In *Ross* v. *State of Oregon*, 227 U.S. 150 (1913), this Court ruled that the prohibition in Art I, Sections 9 and 10 of the Constitution does not apply to changed judicial interpretations of statutes, only to statutes. As said in *James* v. *United States*, 366 U.S. 213, 224 (1961):

> "[T]he *ex post facto* provision of the Constitution has not ordinarily been thought to apply to judicial legislation."

But the pernicious effect of increasing a penalty retroactively is of the same dimension whether the increase is brought about by statute or by "judicial legislation." And, therefore, the possible evil was recognized and eliminated by the Court, which has held that judicial legislation which, *ex post facto*, "alters the situation of the accused to his disadvantage" and imposes an additional penalty upon him, although not barred by Art. I, Section 9 or 10, is nevertheless a deprivation of due process barred by the Fourteenth Amendment. The principle was expressed in the foregoing quotation from *Bouie* v. *City of Columbia*, with the following addition:

> "If a State legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

The principle was followed in *Marks* v. *United States,* 430 U.S. 189 (1977).

The statute retroactively modified by *Matter of Chu,* Judiciary Law 90.4, is not a criminal statute. However, that fact does not change the result.

For due process purposes, an attorney threatened with the penalty or punishment of disbarment because of his conviction of a felony is entitled in this area to the same due process as a person being tried in a criminal court for a crime. "[T]he power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." *Johnson* v. *Avery,* 393 U.S. 483, 490 n.11 (1969). In *Erdmann* v. *Stevens,* 458 F 2d 1205, 1209-10 (2d Cir. 1972), the court said:

> "[A] court's disciplinary proceedings against a member of the bar is comparable to a criminal rather than a civil proceeding . . . it cannot be disputed that for most attorneys the license to practice law represents their livelihood, the loss of which may be a greater punishment than a monetary fine. See Bradley v. Fisher, 80 U.S. [13 Wall.] 335, 355, 20 L. Ed. 646 (1872); *Spevack* v. *Klein,* 385 U.S. 511, 516, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of the law is trial practice. Undoubtedly these factors played a part in leading the Supreme Court to characterize disbarment proceedings as being 'of a quasi-criminal nature,' In re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968)."

In *Ex parte Garland, supra,* the statute involved was not a criminal statute but one on all fours with Judiciary Law 90.4. It was a July 24, 1865 Congressional enactment which, in effect, disbarred, *ex post facto,* attorneys who had aided the Confederacy. The Court held that the statute violated Art. I, Section 9.

It is clear, therefore, that the retroactive application to petitioner of the *Chu* interpretation of Judiciary Law 90.4, thus removing petitioner's safeguards under Judiciary Law 90.2 and increasing the penalty to which he was subject, violated petitioner's Fourteenth Amendment rights as established by the decisions of this Court.

b. *Judiciary Law 90.4 on its face violates the due process clause of the Fourteenth Amendment.*

The automatic disbarment of an attorney upon his conviction of a felony is an arbitrary atavism having no place in our law today. It violates every ordinary conception and instinct as to due process and fairness.

It imposes a grievous, automatic punishment upon an attorney without any inquiry or action by the court which admitted him to practice and of which he is an officer. This has been fully discussed above.

It unthinkingly imposes a penalty which has no necessary relationship to the offense committed.

There are all kinds of crimes bearing the statutory label of "felony" of various degrees of turpitude, and there are all kinds of circumstances, mitigating the turpitude involved, in which felonies can be committed.

Highlighting the illogicality and arbitrariness of the statute is the fact that, until *Chu*, most federal conspiracy convictions were not felonies under the statute, no matter what the venality or turpitude involved, nor was tax fraud within the statute. Attorneys convicted of such federal felonies received penalties from the New York courts ranging from censure, to suspension for varying periods, to disbarment.

By Section 265.05 of the Penal Law of New York, it is a felony to possess a firearm and ammunition outside one's home or place of business. An attorney could violate that section for the most venal motives. But he could also violate it for motives that might be considered praiseworthy: for example, to protect a loved one from an imminent threat of death or injury, there being neither the time nor the means to ward off the threat in any other way.

Similarly, the convicted attorney might be one with a long record of misconduct, indicating an incorrigibly bad character, or he might be one with a long record of honorable service at the Bar, an exemplary private life, selfless public service, and an outstanding reputation.

But, under Judiciary Law 90.4, regardless of the nature or circumstances of the crime, regardless of the motive, and regardless of the character and past record of the attorney involved, without any judicial inquiry or consideration, judgment or action, the convicted attorney would be summarily and automatically disbarred.

This type of brutal and unreasoning arbitrariness is, in fact, one of the reasons why bills of attainder are proscribed. The proscription of bills of attainder is part of the Constitution as originally adopted; the Fifth Amendment guarantee of due process and of course the Fourteenth Amendment, were adopted later. But any legislative

proscription, any bill of attainder, must also be considered a violation of due process, precisely because it prevents any judicial inquiry into the nature and circumstances of the crime and into matters in explanation and mitigation. The same principle would apply here as applies to *ex post facto* "judicial legislation."

The revulsion inspired by the type of arbitrary proscription imposed by Judiciary Law 90.4, and the recognition of the necessity for judicial inquiry, evidence in mitigation and explanation, and a reasoned judicial fitting of the penalty to the offense, runs like a red thread through all of the authorities.

Thus, according to Henry Drinker, in his classic *Legal Ethics* (1963 ed., p. 49):

> "When a lawyer is disbarred it is because the court has concluded after thoroughly investigating and considering the charges against him, as well as his explanation of them and his past record as a lawyer and a citizen . . . that he is not one who should be a member of this honorable profession."

One of the factors which motivated this Court, in *Cummings* v. *Missouri, supra,* in concluding that the automatic defrocking of a priest (or disbarment of an attorney) because he had rendered aid to the Confederacy was impermissibly arbitrary was this: that one might have rendered aid to the Confederacy for different motives—for example, out of love and loyalty to a father; and similar considerations moved the Court in *Ex parte Garland, supra,* to insist that a lawyer can be disbarred only "by the judgment of the court".

In *Randall* v. *Brigham,* 74 U.S. (7 Wall.) 523, 540, 18 L.Ed. 285 (1869), the Court said that disciplinary proceed-

ings required "that . . . notice should be given to the attorney, of the charges made, and an opportunity afforded him for explanation and defense."

In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 246 (1957), the Court ruled that a state could not prevent the admission of an applicant to the Bar (which is no different in principle from disbarring an attorney already admitted) except on the basis of evidence sufficient "to raise substantial doubts about his *present* good moral character" (emphasis added), "a record which rationally justifies a finding that [he] was morally unfit to practice law." In that case, the Court also said (353 U.S. at 239 n.5):

> "We need not enter into a discussion of whether the practice of law is a 'right' or a 'privilege'. Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."

In the companion case of *Konigsberg* v. *State Bar*, 353 U.S. 252, 273 (1956), the Court said:

> "[T]here is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish good moral character . . . "

Mr. Frankfurter, in his concurring opinion in *Schware*, expressed the rule of the case as follows (353 U.S. at 249):

> "Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration which offends the dictates of reason offends the Due Process Clause."

In *In re Ruffalo*, 390 U.S. 544, 550 (1968), the Court said:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack* v. *Klein*, 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge."

In sum, "the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." *Johnson* v. *Avery*, 393 U.S. 483, 490 n.11 (1969).

In *Erdmann* v. *Stevens, supra*, 458 F 2d at 1212, the court said that the New York Court of Appeals "may not uphold a finding of misconduct on the part of an attorney unless it concludes that 'no substantial legal right of the accused has been violated.' "

"The ultimate issues [in a disciplinary matter are] the character of the offense committed and the nature of the penalty, if any, appropriately to be imposed." *Matter of Levy, supra*, 37 NY 2d at 282.

It is necessary to conclude from the foregoing and from the authorities cited in previous sections of this petition, that an attorney is entitled to a hearing before the court at which he has the opportunity to present evidence in mitigation and explanation, and to have the penalty, if any is to be imposed, determined by the court in the light of the evidence, and that the imposed absence of any of these prerequisites violates due process. Judiciary Law 90.4 imposes the absence of all of these prerequisites.

There is no reason, therefore, for surprise at the strong language of the minority in *Matter of Thies, supra*, 45 NY 2d at 867, to the effect that Judiciary Law 90.4 is an

"inflexibly harsh rule [which sacrifices] fairness and reason", one which brings about "abberational [sic] results".

Two federal cases deal directly with the question whether automatic disbarment upon conviction of crime without a hearing and without the fitting of the penalty to the offense violates due process. In both cases the courts concluded that it did. *Matter of Ming*, 469 F 2d 1352 (7th Cir. 1972) and *Matter of Jones*, 506 F 2d 527 (8th Cir. 1974).

In *Ming*, the United States District Court had summarily suspended Ming from practicing before it without a hearing because of his conviction for failure to file federal income tax returns. Ming appealed and the Seventh Circuit reversed the order of the District Court, holding that automatic suspension, without a hearing and without consideration of matters in mitigation and explanation, violated due process. The court said (469 F 2d at 1354):

> "As an initial matter, we would not conceive that every Tom, Dick and Harry of a misdemeanor would serve as a basis for suspension. Secondarily, but conceivably of genuine significance, there is the matter of the duration of the suspension. Extenuating circumstances tending toward a minimization of the penalty very probably would require a hearing for proper development. Recently, in a case of parole revocation, the Supreme Court held that the parolee had the right to a hearing, with minimum due process requirements, including the opportunity to be heard in person and to confront and cross-examine adverse witnesses, Morrisey v. Brewer, 408 U.S. 471, 92 Sup. Ct. 2593, 33 L. Ed. 2d 484 (1972). While in a hearing based on a finalized conviction of a misdemeanor, an attorney may not be allowed to reargue the merits of the conviction, he would seem to have similar interests to those of the parolee, or a person being sentenced for a crime, to some hearing under due process. In such a situation, 'a chance to respond' must be equated to 'the opportunity to be heard' which necessarily implies a hearing. Appellant was not afforded such a hearing and we find that this denial was a deprivation of due process of law."

In *Jones*, the Chief Judge of the United States District Court for the Eastern District of Arkansas made an order striking Jones' name from the list of attorneys of that court upon Jones' conviction in that court of filing false income tax returns, a felony. The Chief Judge acted summarily and without any notice or hearing under a local rule, similar to Judiciary Law 90.4, that one convicted of a felony "shall ipso facto be disbarred." Jones appealed and the Eighth Circuit reversed, again on the ground that the lack of any hearing violated due process. The court said (506 F 2d at 529):

> "[W]e remand the case with instructions that Jones be permitted to present any evidence of mitigation, etc., that he desires. In the event the trial judge feels, after a hearing, that the mitigating circumstances are so compelling that disbarment was not appropriate, he may then amend his judgment by ordering suspension or such other penalty as is deemed appropriate under the circumstances."

Finally, the following two circumstances must be noted.

This Court, the United States Supreme Court, has no rule similar to Judiciary Law 90.4. No matter what the offense of the attorney may be, he is, under Part II, Section

8, of the Rules, given the opportunity for a hearing at which evidence in mitigation and explanation may be presented.

New York State has no statute barring convicted felons from *admission* to the Bar. The matter is left in the hands of the Appellate Division, which grants or denies admission based upon the whole record as to character and fitness. As a result, a flexible rule is followed. See: American Bar Association, Commission on Correctional Facilities and Services, *Results of a Survey Inquiring into State Board of Bar Examiners Policies Relating to Admission of Ex-Offenders.* The various departments of the Appellate Division consider the circumstances surrounding the conviction, the type of felony, the time elapsed since the conviction, and the applicant's behavior since the conviction. In fact, according to the survey, there has been only one convicted felon who has applied for admission to the New York Bar, and he was admitted. The fact that New York will, in proper circumstances, admit a convicted felon to the practice of law, underlines the due process defect of Judiciary Law 90.4.

To the extent that *Hawker* v. *New York,* 170 U.S. 189 (1879) and *Ex parte Wall,* 107 U.S. 265 (1882) are to the contrary, and it is believed that properly read they are not, they do not reflect present realities, they cannot be reconciled with the extensive authority here marshalled, and they should not be followed.

In conclusion, Judiciary Law 90.4 contravenes the frequently expressed views of this Court, is a gross violation of due process, and should be stricken down as a violation of the Fourteenth Amendment.

3. The action of the New York courts in striking petitioner's name from the roll of New York attorneys violated petitioner's rights of due process under the Fourteenth Amendment to the Constitution of the United States.

The sole constitutional justification for the action of the New York courts in striking petitioner's name from the roll of New York attorneys was petitioner's automatic disbarment by reason of Judiciary Law 90.4 as interpreted by *Matter of Chu, supra.* Since, as has been demonstrated above, that disbarment was constitutionally invalid, the order striking petitioner's name from the rolls had no constitutional justification and violated petitioner's Fourteenth Amendment rights of due process.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

JOHN G. BONOMI
630 Fifth Avenue
New York, N. Y. 10020
(212) 397-9751
Attorney for petitioner

SAUL FRIEDBERG
402 South Country Road
Brookhaven, N. Y. 11719
Of counsel

APPENDIX

Order of Court of Appeals Entered October 19, 1978

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of October A. D. 1978.

Present,

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

Mo. No. 822

In the Matter of FRANK J. BRASCO, an Attorney and Counselor-at-Law

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,
Respondent,

FRANK J. BRASCO,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Order of the Appellate Division Dated April 3, 1978

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 3, 1978.

Present,

HON. JAMES D. HOPKINS,
Justice Presiding,
HON. HENRY J. LATHAM,
HON. JOSEPH A. SUOZZI,
HON. SAMUEL RABIN,
HON. J. IRWIN SHAPIRO,
Associate Justices.

In the Matter of FRANK J. BRASCO, an attorney and counselor-at-law, admitted under the name FRANK JAMES BRASCO.

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,
Petitioner,

FRANK J. BRASCO,
Respondent.

In the above entitled disciplinary proceeding, the above-named The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, petitioner, having moved, by a notice of motion dated December 27, 1977, to strike the name of the respondent Frank J. Brasco, an attorney and counselor-at-law, admitted to practice by this court on March 26, 1958 under the name Frank James Brasco, on the ground that the said respondent has been

disbarred by virtue of a felony conviction (violation of US Code, tit. 18, § 371) unlawfully, willfully and knowingly conspired, confederated and agreed with others to obtain and retain from the Post Office Department truck leases and monies payable by unlawful and fraudulent means in violation of statute in the United States District Court for the Southern District of New York on October 21, 1974; and the respondent having cross moved, by an order to show cause dated January 19, 1978, to stay all proceedings in this matter pending determination of the post-conviction proceedings in the United States District Court for the Southern District of New York to vacate the said conviction and for a new trial on the grounds of newly discovered evidence;

Now, upon the said notice of motion and the affidavit of Nicholas C. Cooper in support of petitioner's motion, the affirmation of Michael Rosen and the affidavits of John G. Bonomi and Frank J. Brasca and the exhibits annexed thereto and respondent's memorandum in opposition thereto; the said order to show cause and the affirmation of Michael Rosen the exhibits annexed thereto in support of respondent's cross motion and the affidavit of Nicholas C. Cooper in opposition thereto and in further support of petitioner's motion; and Nicholas C. Cooper, Esq., having appeared of counsel for the petitioner and John G. Bonomi, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the petitioner's motion is hereby granted, and it is further

ORDERED that the respondent's cross motion is hereby denied, and it is further

ORDERED that, effective April 3, 1978, the name of the respondent Frank J. Brasco, admitted under the name Frank James Brasco, is hereby struck from the Roll of Attorneys and Counselors-at-Law by reason of said conviction (*Matter of Chu*, 42 NY2d 490), and it is further

ORDERED that, pursuant to Statute, (Judiciary Law, § 90), the said Frank J. Brasco, admitted under the name Frank James Brasco, is hereby commanded to desist and refrain: (1) from the practice of the law in any form, either as principal, or as attorney or counselor-at-law before any judge, justice, board, commission or other public authority;* (3) from giving another an opinion as to the law or its application or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor-at-law, and it is further

ORDERED and DIRECTED that the said Frank J. Brasco, admitted under the name of Frank James Brasco, shall comply with this court's rules governing the conduct of disbarred, suspended or resigned attorneys—a copy of such rules being annexed hereto and made a part hereof.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

* No "(2)" in original.

ANNEXED DECISION SLIP

In the Matter of FRANK J. BRASCO, an attorney and counselor-at-law, admitted to practice under the name FRANK JAMES BRASCO.

No. 179

Motion by the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, to strike the name of Frank James Brasco from the roll of attorneys and counselors-at-law on the ground that he has been disbarred by virtue of a felony conviction.

No. 379

Cross motion to stay all proceedings in this matter pending determination of the post-conviction proceedings in the United States District Court for the Southern District of New York to vacate the conviction and for a new trial on the grounds of newly discovered evidence.

Motion granted and cross motion denied. Frank J. Brasco, admitted to practice by this court on March 26, 1958 under the name Frank James Brasco, was convicted of a felony (violation of US Code, tit. 18, § 371) unlawfully, willfully and knowingly conspired, confederated and agreed with others to obtain and retain from the Post Office Department truck leases and monies payable by unlawful and fraudulent means in violation of statute in the United States District Court for the Southern District of New York on October 21, 1974.

The clerk of this court is directed to strike the name of Frank James Brasco from the roll of attorneys and counselors-at-law forthwith by reason of said conviction (*Matter of Chu*, 42 NY2d 490).

HOPKINS, J.P., LATHAM, SUOZZI, RABIN and SHAPIRO, JJ., concur.

RULES

SUPREME COURT—APPELLATE DIVISION

Second Judicial Department

691.10 Conduct of disbarred, suspended or resigned attorneys. (a) Compliance with Judiciary Law. Disbarred, suspended or resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary Law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.

(b) Compensation. A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar. A disbarred, suspended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client. Such applications shall be made at special term in the court wherein the action is pending or at special term in the Supreme Court in the county wherein the moving attorney maintains his office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been required to pay had no substitution of attorneys been required.

(c) Notice to clients not involved in litigation. A disbarred, suspended or resigned attorney shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigated or administrative matters or proceedings pending in any court or agency, of his disbarment, suspension or resignation and his consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation and shall advise said clients to seek legal advice elsewhere.

(d) Notice to clients involved in litigation. (1) A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, each of his clients who is involved in litigated matters or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of his disbarment, suspension or resignation and consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation. The notice to be given to the client shall advise of the prompt substitution of another attorney or attorneys in his place.

(2) In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension or resignation, it shall be the responsibility of the disbarred, suspended or resigned attorney to move pro se in the court in which the action is pending, or before the body in which an administrative proceeding is pending, for leave to withdraw from the action or proceeding.

(3) The notice given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred, suspended or resigned attorney. In addition, notice shall be given in like manner to the

Office of Court Administration of the State of New York in each case in which a retainer statement has been filed.

(e) Conduct after entry of order. The disbarred, suspended or resigned attorney, after entry of the disbarment or suspension order or after entry of the order accepting the resignation, shall not accept any new retainer or engage in any new case or legal matter of any nature as attorney for another. However, during the period between the entry date of the order and its effective date he may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(f) Filing proof of compliance and attorney's address. Within 10 days after the effective date of the disbarment or suspension order or the order accepting the resignation, the disbarred, suspended or resigned attorney shall file with the Clerk of the Appellate Division for the second judicial department an affidavit showing:

(1) that he has fully complied with the provisions of the order and with these rules; and

(2) that he has served a copy of such affidavit upon the petitioner or moving party.

Such affidavit shall also set forth the residence or other address of the disbarred, suspended or resigned attorney where communications may be directed to him.

(g) Appointment of attorney to protect clients' interests and interests of disbarred, suspended or resigned attorney. Whenever it shall be brought to the court's attention that a disbarred, suspended or resigned attorney shall have failed or may fail to comply with the provisions of subdivisions (c), (d) or (f) of this section, this court, upon such notice to such attorney as this court may direct, may appoint an

attorney or attorneys to inventory the files of the disbarred, suspended or resigned attorney and to take such action as seems indicated to protect the interests of his clients and for the protection of the interests of the disbarred, suspended or resigned attorney.

(h) Disclosure of information. Any attorney so appointed by this court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of this court which appointed the attorney to make such inventory.

(i) Fixation of compensation. This court may fix the compensation to be paid to any attorney appointed by it under this section. The compensation may be directed by this court to be paid as an incident to the costs of the proceeding in which the charges are incurred and shall be charged in accordance with law.

(j) Required records. A disbarred, suspended or resigned attorney shall keep and maintain records of the various steps taken by him under this Part so that, upon any subsequent proceeding instituted by or against him, proof of compliance with this Part and with the disbarment or suspension order or with the order accepting the resignation will be available.

Order of the Appellate Division Dated June 9, 1978

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 9, 1978.

HON. JAMES D. HOPKINS,
Justice Presiding,
HON. HENRY J. LATHAM,
HON. JOSEPH A. SUOZZI,
HON. SAMUEL RABIN,
HON. J. IRWIN SHAPIRO,
Associate Justices.

In the Matter of FRANK J. BRASCO, an attorney and counselor-at-law, admitted under the name FRANK JAMES BRASCO.

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,
Petitioner;
FRANK J. BRASCO,
Respondent.

In the above entitled disciplinary proceeding, this court, by an order dated April 3, 1978, having directed, *inter alia,* that the respondent's name be struck from the Roll of Attorneys and Counselors-at-law; and the respondent having moved, by a notice of motion, dated May 10, 1978, for leave to appeal to the Court of Appeals from the said order dated April 3, 1978;

Now, upon reading and filing the said notice of motion, the affidavit of John H. Bonomi and respondent's memorandum of law in support of the said motion, the affidavit of Nicholas C. Cooper in opposition thereto, the affidavit of John H. Bonomi in reply thereto; and upon all the papers filed herein; and John H. Bonomi, Esq., having appeared of counsel for the respondent and Nicholas C. Cooper, Esq., having appeared of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby denied.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

ANNEXED DECISION SLIP

No. 2916

In the Matter of Frank J. Brasco, an attorney and counselor-at-law.

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner;

Frank J. Brasco,

Respondent.

Motion by respondent for leave to appeal to the Court of Appeals from an order of this court entered April 3, 1978, which, *inter alia*, directs that respondent's name be struck from the roll of attorneys and counselors-at-law.

Motion denied.

Hopkins, J.P., Latham, Suozzi, Rabin and Shapiro, JJ., concur.

June 9, 1978 — In Re Brasco, Frank J. (Joint Bar Assoc. Griev. Comm. for Second and Eleventh Jud. Distr.; Brasco) — No. 2916

Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1129

FRANK J. BRASCO,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

FRANK A. FINNERTY, JR.
Attorney for Respondent
16 Court Street
Brooklyn, New York 11241
(212) 624-7851

PETER F. TORTORICI
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1129

FRANK J. BRASCO,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Preliminary Statement

Respondent's brief is submitted in opposition to the petition for a writ of certiorari to review the order of the New York Court of Appeals, entered October 19, 1978, denying petitioner's motion for leave to appeal to that Court from an order of the Appellate Division of the

Supreme Court of the State of New York, Second Judicial Department, entered April 3, 1978, which struck petitioner's name from the roll of attorneys of the State of New York. (*Matter of Frank J. Brasco,* 62 A.D.2d 1006, 45 N.Y.2d 711). An application for leave to appeal to the Court of Appeals of New York had been denied on June 9, 1978 by the Appellate Division, Second Judicial Department.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28, U.S.C. 2101.

Statement of the Case

Petitioner Frank J. Brasco was admitted to the practice of law in the State of New York on March 26, 1958, by the Appellate Division of the Supreme Court, Second Judicial Department. While serving in the United States Congress as Representative from the 11th Congressional District of Brooklyn, petitioner was indicted for having allegedly engaged in a conspiracy, while a Congressman, to fraudulently obtain truck leases from the United States Post Office Department during the period from June 1967 to November 1968.

On July 19, 1974, after a jury trial held in the United States District Court for the Eastern District of New York, respondent was adjudged guilty of a one-count indictment which had alleged that he

> ". . . unlawfully, wilfully and knowingly did conspire, confederate and agree with others to obtain and retain from the Post Office Department truck leases and monies payable, by unlawful and fraudulent means, to wit, by defrauding the United States in violation of Title 18, U.S. Code, Sec. 371 and by committing violations of Title 18, U.S.C., Secs. 201, 203 and 1341 (Title 18, U.S. Code Sec. 371)."

On October 21, 1974, a judgment of conviction was entered and Frank J. Brasco was sentenced to

> ". . . imprisonment for a period of Five (5) years, pursuant to Title 18, U.S. Code, Sec. 3651, Defendant to serve three (3) months in a jail type institution. Execution of the remainder of the sentence is suspended. Defendant is placed on probation for a period of fifty-seven (57) months, subject to the standing Probation Order of this Court, and fined $10,000.00, fine to be paid or Defendant is to stand committed until fine is paid or he is otherwise discharged according to law, as well as the costs of the prosecution pursuant to Title 28, U.S. Code, Sec. 1918(b)."

On May 21, 1975, the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction, and thereafter on October 6, 1975 the United States Supreme Court denied petitioner's petition for a writ of certiorari with respect to his criminal conviction (*United States* v. *Brasco,* 516 F2d 816, cert. den. 423 U.S. 860).

Neither the Automatic Disbarment Statute (Judiciary Law, Section 90, Subdivision 4), nor New York's interpretation thereof (*Matter of Chu*) 42 N.Y.2d 490, infringes upon any constitutionally protected right.

1. Retrospective Application of the New York Court of Appeals' Decision In *Matter of Chu* (Supra) Does not Constitute an *Ex Post Facto* Law and Bill of Attainder.

Based upon his conviction of a federal felony crime, petitioner's name was struck from the roll of attorneys and counsellors-at-law of the State of New York, by order of the Appellate Division, Second Judicial Department on April 3, 1978, pursuant to New York Judiciary Law Section 90, subdivision 4, which provides:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (282 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'" (supra at 292).

On October 13, 1977, the New York Court of Appeals modified the *Donegan* ruling in *Matter of Chu,* stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan* was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493)."

The New York Court of Appeals on October 19, 1978, in *Matter of Thies,* 45 N.Y.2d 866, declined to reconsider its earlier *Chu* decision that conviction of a federal felony works an automatic disbarment, reiterating that it was "immaterial that there is no felony analogue under our State statutes matching the federal felony" and pointed out that "the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld."

Petitioner's contention, that the application of the *Chu* ruling to him constitutes an *ex post facto* law and bill of attainder, is wholly without merit.

An *ex post facto* law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to *ex post facto* laws has long been held by this Court to apply solely to criminal statutes (*Baltimore & S.R. Co.* v. *Nesbit,* 51 U.S. 395, see also, *Mahler* v. *Eby,* 264 U.S. 32) and for this reason, petitioner's reliance on *Bouie* v. *City of Columbia* (378 U.S. 347) is unfounded.[1] The Supreme Court's decision in the *Bouie* case was based upon a determination that "if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect" (supra at 354). The case at bar is neither a criminal one nor was the decision in *Chu* either "unexpected" or "indefensible." Judiciary Law, Section 90, has not changed, only the interpretation thereof vis à vis *Matter of Donegan* (supra) has changed, and for this reason petitioner's reliance on *Matter of Garland* (71 U.S. 33) is unfounded.

Petitioner's argument that the *Chu* ruling should not be applied retroactively in petitioner's case further ignores

[1] Disciplinary proceedings have consistently been held to be civil in nature (*Matter of Zuckerman,* 20 NY2d 430, 438 [1967]), cert. den. 390 U.S. 925 [1968], and are not considered to be criminal (*Matter of Unger,* 27 AD2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]).

the fact that it has long been the law that new or revised principles of decisional law apply to all cases not finally adjudicated and in which litigation is pending (*People* v. *Morales,* 37 NY2d 262). In the *Morales* case, the New York Court of Appeals, relying upon authority of this Court, discussed the common-law concept of retroactivity as follows:

> "The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated. (Mishkin, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 58.) Consequently, since the 'correct' law was looked upon as having always been the same, a case decided on direct appeal always received the benefit, or detriment, of any decisional law 'pronounced' before its judgment became final. (See *United States* v. *Schooner Peggy,* 1 Cranch [5 U.S.] 103, 110.) However, once a judgment had become final, it was not affected by law freshly 'pronounced' thereafter. (1 Blackstone's Commentaries 69 [15th ed.]; 1 Black, Judgments [2d ed.], §§245, 246.)" (Supra at p. 268.)

Similarly, rulings of this Court in *Mullany* v. *Wilbur,* 421 U.S. 684 (see *People* v. *Davis,* 49 AD2d 437) and *Morrissey* v. *Brewer,* 408 U.S. 471 (see *People Ex Rel Gambino* v. *Warden,* 43 AD2d 400) have been applied retroactively.

Indeed the law with respect to retroactivity is as stated by this Court in *Linkletter* v. *Walker,* 381 U.S. 618, that, "Under our cases it appears (1) that a change in law will

be given effect while a case is on direct review, *Schooner Peggy,* supra . . ." and ". . . no distinction (is) drawn between civil and criminal litigation . . ." (supra at 627).

In attempting to construe Judiciary Law §90(4) as a bill of attainder, petitioner ignores the prerequisites contained in the definition cited: "A legislative act which inflicts punishment *without judicial trial", Cummings* v. *The State of Missouri,* 71 U.S. (4 Wall.) 277 (1867). Judiciary Law §90(4) requires that an attorney be stricken from the rolls after the attorney has been convicted of a felony *at a judicial trial.* The *Cummings* decision involved a legislative act which required persons to take an oath of Loyalty as a prerequisite to practicing a profession. The "punishment", the exclusion from the practice of a profession was predicated upon the mere failure of the applicant to take the prescribed oath with judicial intervention totally absent in the process of the execution of the statute. Surely, this is not the case, whereas a prerequisite to the operation of Judiciary Law §90(4), an attorney is first tried in a Court of law with all of the attendant constitutional protections afforded a criminal defendant, and is then adjudged, beyond a reasonable doubt, to have been guilty of a felony crime.

The Courts of New York have specifically disposed of petitioner's "Separation of Powers" argument, noting that the statute (§90) is merely "declaratory of a jurisdiction [power of the courts to regulate attorneys] that would have been implied" (*People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 477; *Gair* v. *Peck,* 6 N.Y.2d 97, 110, cert den 361 U.S. 374).

2. Judiciary Law §90(4) Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioner's automatic disbarment is not violative of his constitutional guarantee of due process since that right was safeguarded throughout his jury trial in the federal court and upon the review of his conviction by the Circuit Court of Appeals for the Second Circuit. Petitioner seeks to review, in a civil disciplinary hearing, his conviction of federal felony crimes which has already been affirmed after appellate review and which the United States Supreme Court itself declined to consider upon his previous petition for certiorari.

The State of New York has a compelling interest in regulating the practice of professions within its boundaries and is given wide latitude in determining what standards are appropriate for such regulation (*Goldfarb* v. *Virginia St. Bar,* 421 U.S. 773, 792 [1975]).

The interest of any state in the regulation of the practice of law is particularly important. The quality of the practice of law has a vital effect upon the public welfare. The requirement of high standards for attorneys is necessary not only to assure the orderly and efficient administration of justice but also to assure the public of proper counseling and representation. There are few areas of activity which do not have serious legal implications and the authority and responsibility conferred upon attorneys is extraordinary (*Ibid.; Schware* v. *Bd. of Bar Examiners,* 353 U.S. 232, 247 [1957] [Frankfurter, J., concurring]).

Respondent recognizes that the power of a state to regulate the practice of law may not be exercised in an arbitrary or discriminatory manner (*Konigsberg* v. *Bd. of Examiners,* 353 U.S. 252, 273 [1957]). Respondent also recognizes that it may not be exercised in a way which infringes upon constitutional rights (*Bates* v. *St. Bar of*

Arizona, 433 U.S. 350, 97 S. Ct. 2691 [1977]; *United Transportation Un.* v. *St. Bar of Michigan,* 401 U.S. 576 [1971]). So long as the state does not exercise its power in such a manner, however, it has autonomous control over the practice of law (*Theard* v. *United States,* 354 U.S. 278, 281 [1957]).

Neither the automatic disbarment statute (Judiciary Law, Section 90, subdivision 4), nor the interpretation thereof by the New York Court of Appeals (*Matter of Chu, infra*), infringes upon any constitutionally protected right. The "right" to practice law may well be an important property or liberty interest within the meaning of the due process clause. It is not a right, however, which has specific constitutional protection. A state may properly adopt a law which adversely affects important property or liberty interests (*San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 31 [1937]). The Constitution merely requires that the legislation be addressed to a legitimate end and that the means taken are reasonable and appropriate to that end. This Court has defined specific Fourteenth Amendment guidelines as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426; (see also: *Rankin* v. *Shankar,* 23 N.Y.2d 111, 119).

The legislature of New York State has determined, in enacting Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]) that an attorney convicted of a felony crime is conclusively unfit to practice law and is automatically disbarred (*Matter of Keogh,* 25 A.D. 2d 499, 500, mod on other grounds, 17 N.Y.2d 479). The purpose of the statute is clear, namely, to maintain high professional standards for members of the bar and to protect the public. The elimination from the bar of attorneys who have been found guilty of felonious conduct is reasonably related to that goal. As the New York Court of Appeals stated in *Matter of Mitchell,* 40 N.Y.2d 153, quoting Judges Cardozo and Bradley:

> "In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, became an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice.' (*People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 471 [Cardozo, J.].) To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice Bradley, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and

> office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (*Matter of Wall,* 107 U.S. 265, 274.)" (*supra* at 156)

Moreover, the constitutionality of Judiciary Law, Section 90, in general and subdivision 4 thereof, in particular has been repeatedly upheld (*Mildner* v. *Gulotta,* 405 F. Supp 182, affd 425 U.S. 901; *Gerzof* v. *Gulotta,* 57 A.D.2d 821, mot for lv to app den, 42 N.Y.2d 960; *Matter of Abrams,* 38 A.D.2d 334; *Matter of Glucksman,* 57 A.D.2d 205; see also: *Matter of Mitchell, supra*).

In *Gerzof,* the Court specifically stated:

> "Moreover, it should be emphasized that the United States Supreme Court has found that section 90 does not violate the Federal Constitution . . ." (*supra* at 822).

To the same effect, the Court in Abrams specifically upheld the constitutionality of the automatic disbarment provision:

> "Although subdivision 4 of section 90 provides for automatic disbarment upon conviction (*Matter of Barash,* 20 N.Y.2d 154 [1967]) respondent's constitutional guarantee of due process is safeguarded by his jury trial and appellate review" (*supra* at 336).

This Court has denied each and every petition for certiorari thus far presented based upon the same claims of constitutional infirmities, by attorneys who were stricken from the roll of Attorneys pursuant to Judiciary Law, § 90, subdivision 4, based upon their conviction of federal

felonies. *Peltz* v. *Joint Bar Association Grievance Committee,* 60 AD 2d 587, mot. lv. to app. den. 43 N.Y. 2d 646, cert. den. May 3, 1978, 436 U.S. 926; *Davis* v. *Joint Bar Association Grievance Committee,* 60 AD 2d 613, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. October 2, 1978, —— U.S. ——; *Rosenberg* v. *Joint Bar Association Grievance Committee,* 62 AD 2d 1065, mot. lv. to app. den. 44 N.Y. 2d 648, cert. den. October 30, 1978 —— U.S. ——; *Cahn* v. *Joint Bar Association Grievance Committee,* 59 AD 2d 179, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. January 8, 1979, —— U.S. ——; *Fayer* v. *Joint Bar Association Grievance Committee,* 63 AD 2d 709, mot. lv. to app. den. 45 N.Y. 2d 708, cert. den. January 8, 1979, —— U.S. ——.

Petitioner's reliance on *Matter of Ming,* 469 F.2d 1352 (7th Cir. 1972) and *Matter of Jones,* 506 F.2d 527 (8th Cir. 1974) in support of his due process objection is unfounded. In *Ming,* the Seventh Circuit failed to apply a *court rule* requiring a summary suspension, where the attorney had been found guilty of a Federal misdemeanor. Section 90(4) is clearly applicable only to felony convictions. The District Court, in *Ming,* specifically noted the existence of a Court rule requiring summary discipline on the basis of a felony conviction and noted no constitutional infirmity with respect to such rule.

The Eighth Circuit's holding in *Jones* that a *Court Rule* providing for summary disbarment upon a felony conviction was violative of due process is inconsistent with this Court's denials of petitions for certiorari presented by attorneys who were stricken from the Roll of attorneys pursuant to Judiciary Law §90(4).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

FRANK A. FINNERTY, JR.
Attorney for Respondent
16 Court Street
Brooklyn, New York 11241
(212) 624-7851

PETER F. TORTORICI
Of Counsel